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A case of quite unique importance appears in the latest volume of the Texas Civil Appeal Reports—the case of Redmond v. Smith, 22 Tex. Civ. App. 323, also reported in 54 S. W. Rep. 636. The question while not one that will often perplex the ordinary practitioner is not without interest to students of the constitution. The general question presented is whether a grant of original jurisdiction to a federal tribunal at the same time makes that jurisdiction exclusive of the State courts, in the absence of an express declaration to that effect. Chief Justice Marshall, in the celebrated case of Marbury v. Madison, contended that the original jurisdiction granted to the supreme court is exclusive and cannot be given by congress to any other tribunal. Subsequent cases of the supreme court, however, have modified, if not virtually overruled this decision. See Bors v. Preston, 111 U. S. 252; Froment v. Duclos, 30 Fed. Rep. 385. The particular question involved in this case, however, is whether a State court can assume jurisdiction of an action against a foreign consul over his objection. In this case the Texas Court of Appeals overruled the plea in abatement of one P. Ornelas, a consul representing the Republic of Mexico at the City of Mexico, who had been sued in the State court on a note signed by him as surety, on the ground that State courts have jurisdiction of actions against consuls and other foreign ministers, since the federal constitution and statutes do not expressly declare the federal jurisdiction in such cases to be exclusive. Judge Neill said in part: "Section 711 Revised Statutes of the United States, as originally enacted, declared: 'The jurisdiction vested in the courts of the United States, in cases and proceedings hereinafter mentioned, shall be exclusive of the several States. * * * 8th, of all suits or proceedings against ambassadors or public ministers or against consuls and vice-consuls.' By Act of February 18, 1875, section 711 was amended by striking out subdivision eight. (Rev. Stat. 1878, sec. 711.) Prior to this amendment, as was generally held, State courts had no jurisdiction of such cases because the jurisdiction of such courts was expressly excluded by the act." The court quotes with approval the opinion of Chief Justice Taney, in the case of Gettings v. Crawford, 10 Fed. Cas. 447, where, in construing the original jurisdiction of federal courts in cases of suits against consuls, the learned judge said: "The State courts are not, and cannot, from the nature of our institutions, be excluded from all jurisdiction in such matters, and the grant of power to the courts of the United States has never been held to exclude them." And further, that "a consul is not entitled, by the law of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits like any other individual, in the tribunals of the country in which he resides."

The Court of Appeals of Maryland has recently passed upon a question in the decision of the case of Gambrill v. Schooley, which they declare has not been considered previously in any reported American case. It was held that the dictation of defamatory matter to a confidential stenographer constitutes a publication upon which to found an action, the court saying that "we have no doubt that the dictation of these letters to the stenographer was the publication of a slander, for which, if nothing further had been done by either, an action of slander could have been maintained, but we have no doubt that the stenographic notes, the typewritten copy and the letter-press copy constituted the publication of a libel, and that either slander or libel could be maintained, as the appellee should elect." The principal argument against such position, briefly, was that, in view of the almost universal employment in this country of stenographers, and the necessity for such employment through the custom of business, a communication to a stenographer should be made an exception to the general rule. In answer to this contention the court said: "Neither the prevalence of any business customs or methods, nor the pressure of business which compels resort to stenographic assistance, can make that legal which is illegal, nor make that innocent which would otherwise be actionable. Nor can the fact that the

stenographer is under contractual or moral obligation to regard all his employer's communications as confidential alter the reason of the matter." While the question does not seem to have been raised in this country, a number of English cases are cited which certainly tend to support the court's view. "This defense," says the Maryland court, "was made in Williamson v. Freer, L. R. 9 C. P. 393, where it was held that the unnecessary transmission by a post-office telegram of libelous matter, which would have been privileged if sent in a sealed letter, avoids the privilege, Lord Coleridge, C. J., saying: 'Although the clerks are prohibited, under severe penalties, from disclosing the contents of telegrams passing through their hands, still there is a disclosure to them.' In Pullman v. Walter Hill & Co. (1891), 1 Q. B. 529, the exact question here presented was decided. There the letter containing the defamatory matter was dictated by the managing director of a corporation to a clerk, who took down the words in shorthand and then wrote them out fully by means of a typewriting machine, and the letter thus written was copied by an office boy in a letter-press book. When it reached its destination it was, in the ordinary course of business, opened by a clerk of the plaintiff; and it was held that the letter must be taken to have been published both to the typewriter and to the copy-press boy, as well as to the plaintiff's clerk. Lord Esher, M. R., in the course of his opinion, said: 'I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself.' Lopes, L. J., said: 'It is said business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter he must write it himself and copy it himself, or he must take the consequences.' Kay, L. J., said: 'The consequence of such an alteration in the law of libel would be this: That any merchant or solicitor who desired to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased, if it was in the ordinary course of his business. That would be an extraordinary alteration of the law and it would enable people to defame others to an alarming extent.'" The Maryland court cites and distinguishes Owen v. G. S. Ogilvie Pub. Co., in the Appellate Division of the New York Supreme Court, Second Department, 32 App. Div. 465. There the decision turned upon the point that, as a corporation must act through an agent, the dictation by the manager of a company of a defamatory letter to a stenographer employed by it, who wrote it out in shorthand, typewrote and mailed it, did not constitute a publication, as both manager and stenographer were servants of the corporation, engaged in the performance of their duties, and their respective acts in theory constituted but a single act.

NOTES OF IMPORTANT DECISIONS.

CONTRACTS—NON-COMPLIANCE — EXCUSE. — In Richmond Ice Co. v. Crystal Ice Co. the Supreme Court of Virginia holds that an ice company, undertaking to furnish ice to another company from day to day out of its surplus product, which was not to interfere with a previous contract to furnish ice to a third company, was not relieved of liability for failure to comply with such undertaking by the mere fact that it did not have a surplus on hand; but, knowing that the buyer was bound, subject to a penalty, to furnish the ice to others, it was its duty to exercise ordinary diligence in keeping a surplus on hand, and that an ice company undertaking to furnish ice from day to day from its surplus product to another company, which was to pay for a certain amount whether taken or not, cannot recover for ice not taken, the failure to take being caused by the first company's neglect to keep a surplus and furnish the amount required from day to day. The court says in part:

"The defendant insists that under the terms of that agreement it was only bound to furnish ice to the Mutual Ice Delivery Company for the plaintiff out of its surplus product, and so as not to interfere with furnishing its own quota to that company, and that during the period when it failed to furnish the plaintiff's quota of ice its surplus product was not sufficient to furnish more ice than it did furnish without interfering with its own contract with the Mutual Ice Delivery Company, and asked the court to so instruct the jury, which was done by giving the defendant's instruction numbered 1.

"The giving of that instruction is assigned as

error. The objection urged to it is that it told the jury that the defendant was not liable for failing to furnish the plaintiff's quota of ice during the period in question, if the defendant did not have a surplus product of ice on hand, although its failure to have a surplus was its own fault.

"There is evidence tending to show that the defendant, by the exercise of ordinary diligence in putting in its new machine for the manufacture of ice, could have had all three of its ice machines in operation in time to have furnished the plaintiff's quota of ice during the period in question.

"The only limitation on the defendant's obligation to furnish the ice was that it was to be out of its surplus product, and was not to interfere with its prior contract with the Mutual Ice Delivery Company; but that did not relieve it from the duty of exercising ordinary diligence in manufacturing the ice which it had undertaken to furnish, and only protected it from liability in the event that it was unable to furnish it without default on its part, and the instruction was erroneous in not so informing the jury. See James River & Kanawha Co. v. Adams, 17 Gratt. 427; Taylor v. Caldwell, 113 E. C. L. 824; Howell v. Coupland, L. R. 9 Q. B. 462.

"If the defendant's inability to furnish the plaintiff's quota of ice from day to day to the Mutual Ice Delivery Company was the result of the defendant's failure to exercise reasonable diligence and care in putting its machines in a condition to manufacture a sufficient quantity of ice to enable it to furnish what it had contracted to furnish from day to day, then it was liable to the plaintiff for such breach of contract. The defendant knew, as the evidence shows, that, under the contracts which it and the plaintiff had with the Mutual Ice Delivery Company to furnish ice, if either failed to furnish its quota as called for the Mutual Ice Delivery Company was authorized to purchase so much ice as was necessary to fill the quota of the company so failing, and charge that company with the cost of the ice so purchased. In so far, therefore, as the defendant was in fault in not furnishing the plaintiff's quota of ice to the Mutual Ice Delivery Company, it was responsible to the plaintiff for the difference between $2 30 per ton, the price at which the defendant had agreed to furnish it, and the price per ton which the plaintiff was compelled to pay in order to keep and perform its contract with the Mutual Ice Delivery Company."

MEASURE OF DAMAGES—PROFITS.—In Cleveland, C., C. & St. L. Ry. v. Wood it was held by the Supreme Court of Illinois that where the consideration which moved a lessee to lease land of a railroad and erect a hotel thereon was the company's agreement to stop its trains there for meals, the profits to be received from the guests thus brought to the house were the sole object of the contract, and such profits constitute a proper measure of damages for breach to the extent they are susceptible of being ascertained with reasonable certainty.

It was further held that where an agreement by a railroad to stop its trains for meals, which was the consideration on which a hotel was built, was breached before the completion of the building, the profits to accrue being problematical, the court properly permitted the damages to be measured by a diminution in the rental value of the premises, caused by the breach, and in estimating the rental value the increased business resulting from the company stopping its trains for meals was a necessary factor. The court cited, among other authorities, 8 Am. & Eng. Enc. of Law (2d Ed.), 622; 3 Sutherland on Damages, page 1980. The following is from the opinion:

"In the case at bar the consideration which moved the lessee to enter into the covenants of the lease was the covenant entered into by the said railroad companies to stop their trains at the depot adjoining this hotel. The profits and gains to be secured from the guests thus brought to the hotel was the sole object of the contract. Such profits and gains constituted a proper measure of damages to the extent they were susceptible of being ascertained with reasonable certainty. There was, however, no attempt to prove loss of profits as the measure of the damages to be recovered. The appellee was allowed to submit to the jury the opinions of witnesses as to the rental value of the leased premises with the trains of the appellant company stopping there in compliance with the terms of the lease and the rental value without compliance, and the value of the leasehold with and without such compliance on the part of the appellant company; and the jury were instructed that the appellee, if entitled to prevail, should recover such damages, if any, as it should appear from the preponderance of the evidence he had sustained in the diminution in the value of the leasehold by reason of the alleged failure of the appellant company to fulfill the covenants of the lease. The appellant, as we think, has no cause to complain that this measure of damages was adopted. When an established business has been interrupted or destroyed, the profits which the business yielded before such interruption or destruction may furnish a basis of fact on which to determine the profits of which the proprietor of the business has been deprived; or, in some instances, the volume of the business, and the profits flowing therefrom, are of such nature that the profits may be proven with a reasonable degree of certainty. In such state of case, when the action is for the breach of a contract, such as the one at bar, the prospective profits of the business may be adopted as the proper measure of recovery. But in this instance the hotel had not been operated with trains stopping there as contemplated by the contract, and for that reason the profits to accrue were so largely problemat-

ical and conjectural that the trial court wisely held the damages might be measured by any diminution in the rental value of the premises consequent upon a breach of the covenant by the appellant company. It was proven that the hotel had practically no guests save such as would be brought to it for meals and lodging by the trains of the railroad company. It is manifest that the rental value of a hotel depends on the number of guests likely to come or be brought to it. In forming a conclusion as to the rental value of the premises, the fact that the trains of the appellant company stopped for meals or did not so stop became a necessary factor. It was proper for those having knowledge as to the fact to state the rental value of the premises under both conditions. This would involve consideration of the rental value arising from the facilities enjoyed for receiving patronage. Such testimony is quite distinguishable from that which would establish profits from which to measure damages."

DEED — EXECUTION — SUFFICIENCY OF EVIDENCE.—It is held by the Supreme Court of Wisconsin, in Linde v. Gudden, that it is not sufficiently established—that is, beyond reasonable controversy—that a deed, duly acknowledged, was not executed by defendant, it purporting to be signed by her; her signature being, in the opinion of experts, authentic; her acknowledgment being certified by a magistrate; and the grantee and a witness to the deed testifying that she signed it; and there being, on the other hand, simply her denial, and the testimony of a witness to the deed that her name was not on it when he signed it; he not testifying, however, that it was not placed there before the acknowledgment, which was not till five days after the date of the deed. The court says:

"No rule is more firmly established in this State than that, to justify a finding against the execution, according to its terms, of a formal conveyance, duly acknowledged, the evidence must be perfectly clear, convincing, and satisfactory; that the defense must be established beyond all reasonable controversy,—indeed, as some authorities put it, beyond a reasonable doubt. Kercheval v. Doty, 31 Wis. 476, 491; Harter v. Christoph, 32 Wis. 245, 248; Smith v. Allis, 52 Wis. 337, 345, 9 N. W. Rep. 155; Bank v. Muth, 96 Wis. 342, 345, 71 N. W. Rep. 361; Fillingham v. Nichols (Wis.), 84 N. W. Rep. 15. True, most, if not all, of these cases are addressed to denial of the correctness of the substance of the conveyances, but the reasons for demanding at least as much, if not more, certainty of proof to overcome the apparent fact of the execution of a conveyance are even greater; for, if the paper were neither signed nor acknowledged by the ostensible grantor, then, apparently, two crimes have been committed,—the crime of forgery by whomsoever wrote the name, and the crime of false certification by the acknowledging officer. The presumption of innocence is always a most cogent and persuasive one, not to be overcome by any evidence short of substantial certainty.

"An examination of the record in this case discloses a document purporting to be signed by the respondent, her signature sufficiently similar to other admitted signatures to lead several bankers and other experts to believe in its authenticity. Her acknowledgment thereof is certified by a magistrate now dead. The fact that respondent signed is also supported by the direct testimony of two witnesses, more or less interested, it is true. On the other hand, it is denied by herself on oath, upon the trial. That denial is in some degree confirmed by the testimony of one of the witnesses to the deed, Mischke, who puts himself in conflict with Clarissa Linde and B. C. Gudden as to whether respondent's name was on the deed at the time he signed as a witness. He does not, however, pretend to testify that it was not placed there at some subsequent date, before the acknowledgment, which did not take place until five days after the date of the instrument. His testimony, therefore, is inconclusive upon the main question whether she executed it at all and whether she acknowledged it. It is urged that there was no reason or consideration for the execution of the deed, but this position is not tenable. We cannot avoid the conclusion that by her previous deed respondent had released any liability of her husband to her for the principal of the money which she had placed in his hands, and had accepted in lieu thereof an agreement to pay her $180 per annum through her life. By this deed she apparently was to receive substantially the principal of that sum, and did receive it in the form of two mortgages delivered to her at about that time, and subsequently assigned to her by her husband.

"In the view of this evidence, it might be thought a fairly debatable question whether respondent's name was signed to the deed at the time when it was subscribed by the witnesses,—a question upon which the finding of the court below perhaps ought not to be disturbed; but upon the crucial question, whether at any time she affixed her signature thereto, the deed itself and its certificate of acknowledgment stand undenied, save by the testimony of the respondent herself. It has been held in many cases, and is strongly intimated by some of those above cited, that in no case can the testimony of the party who would overturn a deed alone overcome the force of apparent execution and of the official certificate. Howland v. Blake, 97 U. S. 624, 627, 24 L. Ed. 1027; Johnson v. Van Velsor, 43 Mich. 208, 219, 5 N. W. Rep. 265; Smith v. McGuire, 67 Ala. 34; Blackman v. Hawks, 89 Ill. 512, 514; Warrick v. Hull, 102 Ill. 280, 283; Sassenberg v. Huseman, 182 Ill. 341, 349, 55 N. E. Rep. 346. In deference to the rules of evidence thus established, we cannot yield to the conclusion of the circuit court that respondent did not execute this deed. We are forced to the view that he could have made that finding only by ignoring those

rules of evidence, and deciding the question before him as he would any other, upon the mere preponderance of evidence as it appeared to him, and not because he was convinced beyond a reasonable controversy."

CRIMINAL LAW — UNLAWFULLY PRACTICING MEDICINE—BURDEN OF PROOF.—The principal point decided by the Supreme Court of Kansas, in State v. Wilson, 64 Pac. Rep. 24, is that in a prosecution for unlawfully practicing medicine in violation of the statute it devolves upon the defendant to produce evidence tending to show that he has attended two full courses of instruction and graduated in some medical college in this or some foreign country, or a certificate of qualifications from some State or county medical society, as such evidence is not accessible to the State, and is peculiarly within defendant's knowledge and under his control. The court on this point says:

"A more important question is presented by the instruction of the court, which substantially changes the burden of proof in this class of cases. It is scarcely necessary to announce that ordinarily the burden of proving the guilt of the defendant, and every essential ingredient thereof, beyond a reasonable doubt, is upon the State, and the accused stands on the presumption of his innocence until a complete case is made against him, and if the testimony is insufficient on any material point he must be acquitted. 'These rules are merely stated. Neither the public nor the profession is interested in the discussion of questions long settled, well understood, and generally acquiesced in.' The court undoubtedly regarded this case as exceptional in its nature. The authorities are not free from conflict, but the weight thereof appears to preponderate in favor of the position taken by the trial court in this case. The reason for the rule sought to be laid down by those courts which hold that the State need not assume the burden of proving such negatives as must be averred under the statute above quoted is found in its necessity. We have not been able to find a definition which seems altogether satisfactory, and may not be able to give one. The following rule is quoted with approval by many courts in criminal as well as civil cases: 'Where the means of proving the negative are not within the power of the party alleging it, but all the proof on the subject is within the control of the opposite party, who, if the negative is not true, can disprove it at once, then the law presumes the truth of the negative averment from the fact that such opposite party withholds, or does not produce the proof that is within his hands, if it exists, that the negative is not true.' 5 Am. & Eng. Enc. Law, p. 42, note 1. Without giving unqualified assent to that rule, we remark that a failure of justice would usually result if the State were required to prove in a case like the present that the defendant had not attended two full courses of instruction and graduated at some respectable medical college in this or some foreign country, or that he could not produce a certificate from some State or county medical society; for, where a person had determined to engage in the unlawful practice of medicine, he would naturally seek a location among strangers, and would refrain from imparting facts in relation to his past history which the prosecution would be unable to trace, although he might be an empiric ignoramus as well. We think the rule ought to be that where the State denies the right to its citizens generally to engage in a particular trade or profession, and grants such right to those of its citizens only who have acquired a certain degree of proficiency therein, and prescribes certain documentary proof as requisite to show that a particular citizen has such right, but does not require such proof to become a matter of record in any public office in the county where such person engages in such trade or profession, upon the trial of a case wherein it is alleged by the State, in substance, that a person against whom the information is filed has not complied with the laws of the State, and is following such trade or profession in violation thereof, is unqualified therefor, and has not and cannot produce such evidence as he is required to possess of his qualifications before he can engage therein,—because of the impracticability, if not the utter impossibility of the State being able to prove such negative averment, and because, also, that the defendant can readily produce the required evidence, as well as because his interests would prompt him to do so,—in order that justice may be done, the defendant should be required to produce such evidence. Dr. Bishop lays down this rule: 'One of the leading presumptions in our law is that what is common in general belongs also to the particular. This is a *prima facie* presumption, and the party who would resist its force must show that in the particular instance the fact is otherwise.' Commenting upon this rule, the learned author says: 'From this it follows that if the law forbids the mass of the community to sell intoxicating liquor, but grants license to some particular individuals to sell it, then, if some one person is indicted for making an unlicensed sale, the presumption that what is common in general belongs likewise to the particular stands as *prima facie* proof, and the defendant, if he has a license, must show it. This conclusion of legal reasoning is aided by the further consideration that since the averment is a mere negative one, and, if it is not true, the defendant has in his own possession the evidence to show the truth, the orderly and convenient administration of justice is promoted, while no harm is done to the individual, by casting the burden on him.' Bish. St. Crimes, § 1051. Cases for the sale of liquor and drugs and medicines, and the operation of ferries, and the like, without license, present features which are analogous to the case under consideration, and in most of the States the courts

have held that it is not necessary for the prosecution to prove that the defendant had no license. Different reasons are assigned for the establishment of this exceptional rule. In several States a labored effort is made to prove that the rule is not exceptional in its nature, but that it accords with the ordinary procedure in criminal cases. An attempt to reconcile the reasons thus given would be fruitless. Indeed, most of these cases extend the rule much beyond the point we regard as justifiable. For instance, in this State liquor is not allowed to be sold, except upon a druggist's permit, which is granted in the county where the business is to be transacted; and the fact of issuing the permit is made a matter of public record in the office of the probate judge, which is held at the county seat where the court meets, and generally in the same building where it convenes. Now, the reason for making an exception in this class of cases, being that to require the State to prove that the defendant did not have a license or certificate or permit would often be, in effect, to require the State to perform an impossibility, can have no application to a case where competent evidence in regard to the fact is as accessible to the State as it is to the defendant. And in the absence of a statutory regulation relieving the State from the duty of proving that one charged with the unlawful sale of intoxicating liquor did not have a permit therefor, because the reason for the rule fails in such a case, the rule itself ought to fail, and the State, having access to admissible evidence, ought to be required to produce it. This is in accord with earlier decisions of this court. State v. Schweiter, 27 Kan. 499; State v. Nye, 32 Kan. 201, 204, 4 Pac. Rep. 134, 136. In other words, where evidence to prove the negative averment is not peculiarly within the knowledge of the defendant, but is also within the knowledge and control of, or upon reasonable effort and by the exercise of proper diligence may be secured by, the State, then, and in such case, the prosecution is bound to produce such evidence, and, failing to do so, the defendant ought to be acquitted. Applying this distinction to the case at bar, it will be readily seen that it might well be beyond the power of the State to prove either of the negatives alleged in the information in this case. The facts and the evidence in relation thereto are, and of necessity must be, peculiarly within the knowledge and under the control of the defendant, while, as above remarked, his desire to stand well with his patrons and with the community generally would naturally prompt him to submit evidence to remove the cloud cast upon his professional reputation by such an inquiry; and therefore to require him to produce such evidence would result in no injury, but in a positive benefit to him. For these reasons there was no error in the charge of the trial court that the defendant was required to produce some evidence tending to show his qualifications. Bish. St. Crimes, §§ 1051-1053, and cases cited; Wheat v. State, 6 Mo. 455; People v. Nyce, 34 Hun, 298; 5 Amer. & Eng. Enc. Law, *supra*, and cases cited; Underh. Cr. Ev. § 24, and cases cited; Black, Intox. Liq. § 507, and cases cited; State v. Crow, 53 Kan. 663, 37 Pac. Rep. 170."

THE ENFORCEMENT OF PAROL CONTRACTS RELATING TO REAL ESTATE.

In the contribution which England has made to American jurisprudence no statute is better known, and none more far reaching in its effects, than what is known as the statute of frauds passed in the reign of Charles II. This statute provided in part that no action shall be brought upon any contract or sale of lands, tenements or hereditaments, or on any interest therein, which is not in writing, signed by the party to be charged with it. With very little change, if any, this statute is to be found incorporated into the statute law of nearly every State in the Union. It is likewise provided in nearly all the States that nothing contained therein shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance. But old as is the rule that contracts relating to the conveyance of real estate should be in writing, generally known as that rule is, and strenuously as courts have adhered to its rigid enforcement, people still go on making oral contracts relating to realty, and the equity side of our courts is still appealed to for a relaxation of its provisions. And it must be said that equity, in its effort to afford relief where law is powerless to act, must often find itself in the trying position of being between a strong suspicion of fraud on one side and an open violation of a statute designed to prevent fraud upon the other. The only grounds upon which courts can specifically enforce parol contracts, which are within the statute of frauds, is upon the grounds of part performance, although, as we shall see, there is a line of cases emanating from some of our best courts by which contracts which should have been specifically enforced have been declared to be inoperative as being within the statute of frauds, but which have been given effect to by a novel rule as to the measure of damages in cases of a breach of contract relating to real estate.

Doctrine of Part Performance.—In the case of Neales v. Neales,[1] Mr. Justice Davis, delivering the opinion of the court, said: "The statute of frauds requires a contract concerning real estate to be in writing, but courts of equity, whether wisely or not, it is too late now to inquire, have stepped in and relaxed the rigidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that it is a fraud for the vendor to insist upon the absence of a written instrument, when he had permitted the contract to be partly executed." The doctrine of part performance is an equitable doctrine. It is well settled that part performance of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions.[2]

Doctrine of the Early Cases.—In an early New York case[3] it was held that a parol contract to pay for certain services on their being performed by conveying a certain piece of land, the services being performed pursuant to the contract, is not void by the statute of frauds. The value of the services can be recovered according to the value of the land promised, which may be resorted to as a measure of damages, although the contract to convey the land cannot be enforced. In a later New York case[4] this rule was modified by holding that the party performing may treat the agreement to convey as a nullity and recover the value of the services under the common counts, not exceeding, however, the amount fixed by the agreement with interest; but he cannot resort to evidence of the value of land as a measure of damages, but if no amount is specified, and the payment is to be a designated piece of land, the plaintiff may then prove the worth of the land with a view of ascertaining the value of the services. The doctrine of both of these cases was set aside in a later New York case,[5] where it was said that the universal rule in cases where the contract is void is the value of the services, not that of the land that is to be recovered. This value is to be ascertained by the agreement of the parties fixing it, if any, and, if none, by proof of what they were worth. When the agreement fixing the compensation is void, it furnishes no evidence of value. Were it otherwise, and had the plaintiff the right to prove the value of land as showing the value of services, according to the understanding of the parties, such value would constitute the rule of damages, and thus the plaintiff would receive the full benefit of the bargain. Under such a rule the statute would afford but little protection to the defendant. Under an instruction by the court that the value of the land is the evidence of the understanding of the defendant of the value of the services, the jury will almost invariably make that the basis of their verdict.

The same doctrine laid down in the early New York cases was adhered to in Pennsylvania,[6] but was later overruled.[7] The Pennsylvania court, in overruling the doctrine of the earlier case, said: "Under the rule in Jack v. McKee a grandson, whose services at his own estimate did not exceed eighteen hundred ($1,800) dollars, had swept away the fairest portion of an estate of ten thousand (10,000) dollars, while in another case a domestic whose services, had they been the subject of compensation, would have been comparatively insignificant, had under the rule above mentioned taken the entire estate from the right heir. In another Pennsylvania case[8] the decedent agreed with two distant relatives that if they would come and live with him they should share his property equally with his nephews after his death. He failed to carry out his agreement, and suit was brought against his executors for the value of the promised share of his estate. The plaintiff offered to prove the value of the decedent's estate and the share of each nephew for the purpose of showing the dam-

[1] 9 Wall. 1.

[2] Norton v. Preston (Me.), 32 Am. Dec. 129; Lane v. Shackford, 5 N. H. 130; Kidder v. Hunt, 1 Pick. 328; Thompson v. Gould, 20 Pick. 134; Thomas v. Dickenson, 14 Barb. 90; Hunt v. Coe, 15 Iowa, 197; Eaton v. Whitaker, 18 Conn. 222.

[3] Burlingame v. Burlingame, 7 Cow. 92.

[4] King v. Brown, 2 Hill, 485.

[5] Erben v. Lorillard, 19 N. Y. 299.

[6] Jack v. McKee, 9 Pa. St. 235.

[7] Hertzog v. Hertzog, 34 Pa. St. 418. The court said in this case: "Whenever departure from settled principles is shown by experience to have worked perniciously, to have occasioned wrong and hardship which was not anticipated, and to have placed the inheritance of families at the mercy of parol evidence, we think it the imperative duty of the court that made the departure to undo the mischief as far as possible, and to retrace their steps back to their old paths."

[8] Graham v. Graham, 34 Pa. St. 475.

age sustained by the plaintiff. To this offer the defendant objected, on the ground that the measure of damages was the value of the services rendered and was not to be governed by the value of the defendant's estate." Strong, J., said: "Without pressing the insufficiency of the proof of the contract * * * it by no means follows that the measure of damages in an action for its breach is the value of the thing promised at the time of the breach. Jack v. McKee, *supra*, is no longer the rule. This court has returned from the departure that was made in that case." In an Indiana case[9] one Frost agreed with the father of Jane Tarr to take Jane into his family, board, clothe and educate her, and if she lived with him in his family until she was twenty-one years old he would bequeath to her a share equal to that of any of his children. He left an estate of twenty thousand ($20,000) dollars, but cut off the girl. The court said: "The contract is one that specific performance of which could not be decreed; but it does not follow, because a court will not decree specific performance of a contract, that therefore no action for damages will lie upon it when it has been violated. On the contrary such an action will lie and the damages in this case may be measured by the value of the portion that was promised, and that the plaintiff in such a case is not limited to the value of the services performed in the recovery."[10] The effect of these early decisions, while not directly interfering with the operation of the statute of frauds, was in reality indirectly abrogating its provisions, by giving relief in the form of damages equal to the value of the land orally promised to be conveyed.[11] The conclusion reached by the courts in the cases referred to undoubtedly came about through an effort on the part of equity to give adequate relief in cases where a person, oftentimes a relative, had labored for years for another, under an oral promise to be compensated by the conveyance or the devise of land, and whose services and attentions could not be estimated in money. The result obtained was probably right and just. But better reason would have led to a decree of specific performance of a contract, void by the statute of frauds, but which has been taken out from under the operation of that statute by acts which constitute part performance. The object attained would have been the same. A strong line of cases will be referred to later which support this view and which are among the interesting cases upon the question of specific performance.[12] When we consider the vigorous efforts that were made by Chancellor Kent and others to resist encroachment upon the statute of frauds, it is not to be wondered at that courts fell into the error of allowing an award of damages equal to the value of the estate promised, in cases where the equities were clearly on the side of the promisee and against the promisor. In one case Chancellor Kent said: "The tendency of the cases is to prefer giving the party compensation in damages, instead of a specific performance." Quoting Lord Redesdale he said further: "Under pretense of part execution, if possession is had in any way whatever, means are frequently found to oblige a court of equity to break through the statute of frauds, and he said it was a common expression at the Irish bar that it had become a practice to improve gentlemen out of their estates."

What Acts Constitutes Part Performance. Marriage, coupled with possession, has been held sufficient part performance to take an oral contract for the conveyance of land out of the operation of the statute of frauds.[13] In the above case it was said: "The consummation of the marriage in a case like this is to be considered equivalent to the payment of the purchase money in a pecuniary contract. In both cases the consideration is discharged. There is to be found then in this case two ingredients which, when combined, have always been regarded as relieving a parol agreement from the operation of the statute, * * * pursuance of the consideration and a change of possession under the con-

[9] Frost v. Tarr, 53 Ind. 390.

[10] Bell v. Hewitt, 24 Ind. 280; Lee v. Carter, 52 Ind. 342.

[11] In Wallace v. Long, 105 Ind. 522, 5 N. E. Rep. 670, the court, quoting the language of another, says: "It gradually dawned upon the judges that there was no real difference between the land itself and its market value, and that allowing the plaintiff to recover the latter was in effect giving him specific performance of the contract."

[12] See Kofka v. Rosicky (Neb.), 25 L. R. A. 207 and cases cited.

[13] Dugan v. Gittings, 43 Am. Dec. 312; Gregory v. Mighell, 18 Ves. 328.

tract." In Ungley v. Ungley, cited below, it was said by Malins, V. C.: "I must say in this case, as I have said on similar occasions before, that the decisions are to be regretted which have uniformly held that marriage is not part performance so as to take parol contracts out of the statute." But marriage coupled with possession is. In that case a father verbally promised, in contemplation of his daughter's marriage, to give her a house, and she and her husband took possession of the house, the possession so taken, in connection with the consummation of the marriage, took the contract out of the operation of the statute.[14] But marriage alone is not such part performance as will take an oral agreement out of the statute.[15] In some of the earlier cases it was held that payment of the consideration alone would so operate as to justify specific performance of an oral contract.[16] In the case of Townsend v. Houston, the chancellor said: "If the party paying can by parol prove the fact of payment and the object, then it is apparent the door is open to perjury and fraud, and the statute would be rendered useless and its provisions defeated, * * * but if the fact of payment is connected with the concurrent act of the vendor receiving and appropriating the money paid as purchase money, * * * a fact thus appearing would be conclusive of an existing agreement of which it was part performance, and which the defendant having carried part into execution should be compelled specifically to perform the whole." The statute of frauds in some of the States, notably Iowa, in express terms declares that the acceptance of the purchase price, or a part thereof, by a vendor of land shall make a verbal contract of sale binding. The general rule, however, is otherwise. Payment of the consideration alone is not sufficient part performance to take an oral agreement relating to land out of the statute of frauds. This appears to be now settled by the clear weight of authority.[17] But the reason for this is that in such a case the repayment of the consideration will place the parties in the same situation they were before the making of the contract, and, therefore, the party asking for a specific performance will be refused, on the grounds that he has an adequate remedy at law. It has been even held in Minnesota[18] that the inability of the vendor to repay the money does not alter the rule, without regard as to whether he became insolvent at the time of the oral contract or later. There is no doubt but what the delivery of possession, coupled with the making of valuable improvements or the payment of the purchase price, is at all times sufficient to take a contract out from under the operation of the statute,[19] and it is pretty well settled that delivery of possession alone having reference to the contract is all that is required.[20] The reasoning of the courts, which hold that delivery of possession is sufficient in itself to remove a case from the operation of the statute, is that if the contract were avoided the party in possession would become liable as a trespasser.[21] But the possession must be delivered according to the contract, and not be obtained wrongfully, otherwise it will not be considered as an act of part performance, as in the case of a tenant who continues in possession after his term. The taking possession of one parcel has been held to be a sufficient performance for the whole.[22] It has been held in Pennsylvania that the possession must be definite in its limits, exclusive and notorious. The contract itself must be clearly and satisfactorily proven and must not be vague or uncertain in its terms.[23]

Gifts.—There have been some confusion and difference of opinion in the courts as to whether delivery of possession is alone sufficient to take a parol gift of land out of the

[14] Ungley v. Ungley, L. R. 4 Ch. Div. 76; Nowack v Berger (Mo.), 31 L. R. A. 810; Durham v. Taylor, 29 Ga. 166; Chichester v. Vass, 4 Am. Dec. 531; Finch v. Finch, 10 Ohio St. 501; Flenner v. Flenner, 29 Ind. 564.

[15] Brown v. Couger, 5 Hun, 625, and cases cited above.

[16] Townsend v. Houston, 27 Am. Dec. 745.

[17] Johnston v. Clancey, 28 Am. Dec. 45; Graham v. Dodge (Ill.), 14 N. E. Rep. 14; Temple v. Johnson, 71 Ill. 14; Lanz v. McLaughlin, 14 Minn. 72; Eaton v. Whitaker, 18 Conn. 222; Fitzsimmons v. Allen, 39 Ill. 440; Black v. Black, 15 Ga. 445; Glass v. Hulbert, 102 Mass. 24.

[18] Townsend v. Fenton (Minn.), 21 N. W. Rep. 726.

[19] Hoffman v. Felt, 39 Cal. 109; Glass v. Hulbert, 102 Mass. 24; Moss v. Culver, 64 Pa. St. 414.

[20] Danforth v. Lancy, 28 Ala. 274; Eaton v. Whitaker, 18 Conn. 222; Tilton v. Tilton, 9 N. H. 386; Johnston v. Glancy, 4 Blackf. 94.

[21] Eaton v. Whitaker, 18 Conn. 222.

[22] Byrne v. Romaine, 2 Edward Ch. 445.

[23] Haslet v. Haslet, 6 Watts, 464; Wallace v. Rappeleye, 103 Ill. 229.

statute of frauds. Some of the cases hold that outside of delivery of possession there must be a valuable consideration paid or secured to be paid.[24] But consideration is part of any contract, and if that is lacking no contract whether it be by parol or in writing can be enforced. There is no reason why a parol gift, if clearly proven, should not stand upon the same footing as a sale of land and should be specifically enforced if possession is taken under it.[25] In Alabama it has been held "that a promise by a father to give a plantation and slaves to his son, if he would remove from another State to this to live, is a gratuity only and not a contract of which a court of equity will enforce a specific performance, although the son has been thereby induced to break up at a loss and been put to trouble and expense by the removal. And a part performance by putting a son in possession and improvement made by him on the land will not warrant a decree of conveyance from devisees."[26] The same rule has been announced in Texas.[27] And possession coupled with slight and temporary improvements have been held insufficient to take a parol gift out of the statute of frauds.[28] This is contrary to the weight of authority.

Cases of Fraud or Mistake.—It has been held also that where a written agreement was accompanied by other stipulations in parol, under circumstances which would make the insisting on the written matter a fraud, a complainant may claim the benefit of the parol matter in connection with the written, and the court will, under such circumstances, disregard the writing as containing the contract, and treat the whole transaction as a verbal contract. And upon the basis of the part performance, where possession has been taken or the acts done amount to part performance, it may receive parol proof of the whole agreement, independently of or in connection with what may be in writing, in order to make out the contract.[29] Mistake which can be clearly shown will have the same effect as fraud in laying a ground for departing from the written agreement.[30] In a leading New York case it was held,[31] where the verbal agreement was to sell two hundred acres, and two hundred and fifty was erroneously included in the conveyance. The grantee took possession and a decree was granted directing a reconveyance of the excess. The learned Chancellor Kent remarks: "It would be a great defect in what Lord Eldon terms 'the moral jurisdiction of the court' if there was no relief for such a case." In Massachusetts and Maine by statute there can be no specific performance of oral contracts relating to realty. This is likewise true in North Carolina and Tennessee. The courts there cannot decree specific performance of oral contracts to convey where the defendant denies the contracts and pleads the statute. In all cases a parol contract can be specifically enforced where the person against whom the contract is sought to be enforced admits the contract, and does not by plea or answer insist upon the statute.

Where the Consideration is Labor and Services.—As an exception to the rule that payment alone will not operate to take a parol contract out of the statute of frauds, a long line of decisions hold that where the payment for the land orally agreed to be conveyed by deed or will is to be made in services, the value of which cannot be estimated by any pecuniary standard, then specific performance will be decreed. This doctrine was first clearly laid down in some early New York and New Jersey cases.[32] In Rhodes v. Rhodes the court said: "It is settled that the payment of the consideration will not in general be deemed such a part performance as to relieve a parol contract from the operation of the statute. But the reason for this, viz.: that in such a case the repayment of the consideration will place the parties in the same situation they were before, shows that the rule applies to a monied consideration only. If the consideration for the contract be labor and services these may

[24] Stewart v. Stewart, 3 Watts, 253.

[25] Freeman v. Freeman, 43 N. Y. 34; Manley v. Howlett, 55 Cal. 94.

[26] Forward v. Armstead, 12 Ala. 124; Pinckard v. Pinckard, 23 Ala. 649.

[27] Boze v. Davis, 14 Tex. 331.

[28] Wack v. Sorber, 30 Am. Dec. 269.

[29] Phyfe v. Wardell, 2 Edwards Ch., 51; Parkhurst v. Van Courtland, 14 Johns. Ch. 15; Gillespie v. Moore, 2 Johns. Ch. 585; Andrews v. Gillespie, 47 N. Y. 487; Beardsley v. Duntley, 69 N. Y. 580.

[30] Tilton v. Tilton, 9 N. H. 386; Chapman v. Allen, 1 Am. Dec. 24.

[31] Gillespie v. Moore, 7 Am. Dec. 559.

[32] Van Dyne v. Vreeland, 11 N. J. Eq. 370; Rhodes v. Rhodes, 3 Sanf. Ch. 305.

sometimes be estimated, and their value liquidated in money, so as measurably to make the vendor whole on rescinding the contract. But in a case like this, where the services to be rendered were of such a peculiar character that it is impossible to estimate their value to Andrew Rhodes by any pecuniary standard, and where it is evident that he did not intend to measure them by any such standard, it is out of the power of any court, after the performance of the services, to restore Henry Rhodes to the situation he was before the contract was made or to compensate him in damages." That was a case where a brother orally agreed to care for his invalid brother for life, in consideration of the invalid brother willing his real estate to him. This principle is now recognized by some of our best courts.[33] In a Missouri case one Mrs. Green made an agreement by which she took in its infancy the child of her brother, upon the understanding that at her death all the property owned by her should go to the child. The child was to nurse and live with her, be as a daughter to her and take care of her for the remainder of her life. The child entered upon the performance of her part of the agreement. Mrs. Green died without having in any way secured the property to the child. The court said: "There are things which money cannot buy, a thousand nameless and delicate services and attentions incapable of being the subject of explicit contract, which money, with all its peculiar potency is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of that contract."

In the late case of Kofa v. Rosicky[33] a girl about seventeen months old was given by her parents to her uncle and aunt under an agreement that they would adopt her, and rear, nurture and educate her, and that she was to be as their own child, and at their death to receive or to be left all the property which they might own. She lived with them until they died, some ten years afterwards, took their name, did not recognize or know her father and mother in the true relation, but knew them as and called them uncle and aunt, and knew and recognized her uncle and aunt as father and mother. The uncle and aunt died possessed of real estate in the city of Omaha, the title to which they did not, either by deed or will, transfer to the child. Held, that there was such a part performance of the contract by the parties thereto as entitled her to a decree giving her the title to the property by way of specific performance of the contract.

On the other hand there are some very able courts which still refuse to extend the doctrine of specific performance to that limit.[34] With all due respect for them it is the opinion of the writer that justice and reason are upon the side of the courts, which have sought to look into the equities of each particular case, and not hemmed in by precedent, have decreed that fraud cannot be perpetrated under color of a statute designed to prevent it. It must be admitted, however, that danger lurks upon the side of a too liberal, as well as on the side of a too rigid, application of the doctrine of specific performance. Each case must stand upon its own merits. The exercise of the jurisdiction of specific performance is not as of course to suitors, but rests largely within the discretion of the court, to be exercised or not as a sound judicial discretion may direct, guided by the known rules of law and equity and the recognized principles of right and justice.

JOHN F. DOHERTY.

La Crosse, Wis.

[33] Wright v. Wright (Mich.), 23 L. R. A. 196; Shahan v. Swan, 48 Ohio St 25; Sutton v. Hayden, 62 Mo. 101; Sharkey v. McDermott, 91 Mo. 655; Brinton v. Van Cott, 8 Utah, 480; Kofka v. Rosicky, 25 L. R. A. 207; Mills v. McCausland (Iowa), 74 N. W. Rep. 930; Svenberg v. Fosseen (Minn.), 78 N. W. Rep. 4; Quinn v. Quinn (S. Dak.), 58 N. W. Rep. 808.

[34] (Neb.) 59 N. W. Rep. 788.

[35] Wallace v. Long, 105 Ind. 522; Pond v. Sheehan, 132 Ill. 312; Wallace v. Rappeleye, 103 Ill. 229; Shearer v. Weaver (Iowa), 9 N. W. Rep. 907; Ellis v. Cary, 74 Wis. 176.

CRIMINAL LAW—CRIME—POWER TO PUNISH—JURISDICTION—MURDER—LOCALITY OF OFFENSE.

PEOPLE v. BOTKIN.

Supreme Court of California, March 14 1901.

1. The legislature has power to declare that a crime committed in part within the State shall be punishable under the laws of the State.

2. If A, in California, prepares and sends a poisonous article to B, in Delaware, with murderous intent, and the article causes B's death in the latter State, such acts constitute the crime of murder committed in part in California, and are within the meaning of Pen. Code, art. 27, subd. 1, declaring that "all persons who commit, in whole or in part, any crime within this State," are "liable to punishment under the laws of this State;" and A is triable and punishable under the laws of California, as if the crime had been committed entirely within that State.

GAROUTTE, J.: Defendant has been convicted of the crime of murder, and prosecutes this appeal. The charge of the court, given to the jury upon the law, contained declarations which were held to be unsound, and constitute reversible error, in People v. Vereneseneckockockhoff, 129 Cal. 497, 58 Pac. Rep. 156, 62 Pac. Rep. 111. In view of the decision in that case, the attorney general concedes that the judgment should be reversed, and the cause remanded to the trial court for further proceedings. But defendant claims that she is not triable at all by the courts of this State, and this contention should now be passed upon; for, if maintainable, a second trial becomes a useless expenditure of money, time, and labor, and necessarily should not be had. For the purposes of testing this claim of lack of jurisdiction in the courts of California to try defendant, the facts of this case may be deemed as follows: Defendant, in the city and county of San Francisco, State of California, sent by the United States mail to Elizabeth Dunning, of Dover, Del., a box of poisoned candy, with intent that said Elizabeth Dunning should eat of the candy, and her death be caused thereby. The candy was received by the party to whom addressed, she partook thereof, and her death was the result. Upon these facts, may the defendant be charged and tried for the crime of murder in the courts of the State of California? We do not find it necessary to declare what the true rule may be at common law upon this state of facts; for, in our opinion, the statute of this State is broad enough to cover a case of the kind here disclosed. There can be no question but that the legislature of this State had the power to declare that the acts here pictured constitute the crime of murder in this State, and we now hold that the legislative body has made that declaration. Section 27 of the Penal Code reads as follows: "The following persons are liable to punishment under the laws of this State: (1) All persons who commit, in whole or in part, any crime within this State. (2) All who commit larceny or robbery out of this State, and bring to, or are found with the property stolen, in this State. (3) All who, being out of this State, cause, or aid, advise or encourage, another person to commit a crime within this State and are afterwards found therein." Subdivision 1 covers the facts of this case. The acts of defendant constituted murder, and a part of those acts were done by her in this State. Preparing and sending the poisoned candy to Elizabeth Dunning, coupled with a murderous intent, constituted an attempt to commit murder; and defendant could have been prosecuted in this State for that crime if for any reason the candy had failed to fulfill its deadly mission. That being so,—those acts being sufficient, standing alone, to constitute a crime, and those acts resulting in the death of the person sought to be killed,—nothing is plainer than that the crime of murder was in part committed within this State. The murder being committed in part in this State, the section of the law quoted declares that persons committing murder under those circumstances "are liable to punishment under the laws of this State." The language quoted can have but one meaning, and that is: A person committing a murder in part in this State is punishable under the laws of this State, the same as though the murder was wholly committed in this State. Counsel for defendant insist that this section only contemplates offenses committed by persons who at the time are without the State. This construction is not sound; for, as to subdivision 1, it is not at all plain that a person without the State could commit in whole a crime without the State. Again, if the crime in whole is committed within the State by a person without the State, such a person could not be punished under the laws of this State; for the State has not possession of his body, and there appears to be no law by which it may secure that possession. Indeed, all the subdivisions of the section necessarily contemplate a case where the person is or comes within the State. If the framers of the section had intended by subdivision 1 to cover the case of persons only who were without the State when the acts were committed which constitute the crime, they would have inserted in the section the contingency found in the remaining subdivisions, which subdivisions contemplate a return to the State of the person committing the crime. It is plain that the section was intended to embrace all persons punishable under the laws of the State of California. The defendant, having committed a murder in part in the State of California, is punishable under the laws of the State, exactly in the same courts, and under the same procedure as if the crime was committed entirely within the State. For the foregoing reasons, the judgment and orders are reversed, and the cause remanded.

NOTE.—*Recent Cases on the Locality of the Offense Charged in a Criminal Indictment.*—The locality of the offense charged in an indictment is not always the easiest problem to solve in a prosecution for crime, and questions of jurisdiction between different States and between different counties in the same State are not few. They arise also in spite of the fact that statutory provisions on the subject exist in nearly every State. It is of course clearly understood that laws relating to crime have no extra territorial force, and that one State has no power to enforce the penal laws of another or punish crimes committed in or against the laws of another State. State v. Reonals, 14 La. Ann. 278; State v. Hall, 114 N. Car. 909.

There are two questions involved in the principal case, which we shall consider in their proper order: First, whether in any case the legislature may provide for the prosecution and punishment of a crime committed in a foreign jurisdiction; and, second, what State has jurisdiction when the crime charged is committed partly in the one and partly in the other jurisdiction. The case of Hanks v. State, 13 Tex. Cr. App. 289, is one of the leading cases on the first question just stated. In this case the court held that article 454 of the Penal Code provides that "persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this chapter, which do not in their commission necessarily require a personal presence in this State, the object of this chapter being to reach and punish all persons offending against its provisions, whether within or without this State." Held, that the legislature did not transcend its legitimate powers in enacting this provision, and that it is constitutional. The particular question decided was that the forgery in another State of titles to land in the State of Texas is an offense against the laws of that State and subject to its jurisdiction. The court said: "The offense charged in the indictment against an appellant comes clearly within the terms of article 454 of the Penal Code. We can see no valid reason why the legislature of the State of Texas could not assert, as it has done here, jurisdiction over wrongs and crimes with regard to the land titles of the State, no matter whether the perpetrator of the crime was at the time of its consummation within or without her territorial limits. Such acts are offenses against the State of Texas and her citizens only and can properly be tried only in her courts." Judge Story, in his Conflict of Laws (4th Ed.), sec. 625b, makes a clear statement of this exception, as follows: "Although the penal laws of every country are in their nature local yet offenses may be committed in one sovereignty in violation of the laws of another, and if the offender be afterwards found in the latter State he may be punished according to the laws thereof, and the fact that he owes allegiance to another sovereignty is no bar to the indictment." This exception, however while it is well sustained by authority is very limited in its operation, and extends only to that class of cases where the act committed in the foreign jurisdiction is especially violative of the sovereignty of another jurisdiction, or the life and property of its citizens, a good example of which is the forgery of the securities of one State by a resident of another State.

The locality of an offense is altogether dependent on the circumstances and on the peculiarity of the crime charged. In most cases it can be said to have been committed wholly within the boundaries of a single jurisdiction. In others it may be divided between two jurisdictions, whenever the part committed in either jurisdiction is a crime by the laws of that State, apart from that part of the act committed in the other. A glance at a few of the latest authorities will throw light on the distinction to be observed in this connection. It is not necessary to the conviction of persons charged with a conspiracy that they should have resided within the jurisdiction of the court trying the indictment at the time the conspiracy was formed, if the conspiracy was entered into and had its headquarters in that jurisdiction. United States v. Howell, 56 Fed. Rep. 21. On indictment under Code, sec. 5373, punishing a father for the voluntary abandonment of his children and leaving them in a dependent and destitute condition, if the abandonment was originally in Alabama, defendant could not be convicted in Georgia, although the mother moved with the children in a dependent and destitute condition into Georgia, and after said removal notified defendant and he still refused to maintain the children. Jemmerson v. State, 80 Ga. 111. A prisoner must be discharged when it appears that he is held under an original complaint which shows that the crime charged was committed in another State, as he cannot be indicted under Const. art. 3, forbidding the finding of an indictment in one State for a crime committed in another. *In re* Rosdeitscher, 33 Fed. Rep. 657. A person is not liable to conviction and punishment for obtaining property by false pretense, where the property has been obtained outside the State, although the false pretense may have been made within the State. Stewart v. Jessup, 51 Ind. 413. B forged and uttered in Missouri a time check upon a railroad company, having its treasury and treasurer in Kansas. The check was first paid by the agent of the company in Missouri, who was afterwards allowed credit therefor by the treasurer in Kansas, upon the supposition that the check was good. Held, that B could not be indicted in Kansas. *Ex parte* Carr, 28 Kan. 1. F, doing business in Atlanta, ordered goods from D & Co., of Louisville, directing them to ship to R in Alabama; F agreeing to consider the goods as consigned to him, and to be responsible therefor, as consignee. Held, that in the absence of proof that F received the goods at Atlanta, a prosecution for larceny after a trust, under Code, sec. 4422, could not be maintained against him at that place. Fox v. Davis, 55 Ga. 298. The constitution of Texas granting the courts power to change the venue in criminal cases, and providing that the legislature shall not pass any local or special law changing the venue, does not prohibit the legislature passing a law authorizing a prosecution for an offense in some other county than that in which it was committed. Mischer v. State (Tex. Cr. App.), 53 S. W. Rep. 627, citing Eilenbecker v. District Court, 134 U. S. 31, and State v. Wells, 46 Iowa, 662. A conviction may be had of the offense of receiving stolen property knowing the same to have been stolen, although the orignal theft may have been committed in another State. State v. Suppe, 60 Kan. 566. Where a homicide was committed partly within the State and partly without, the power to punish it depends on the question whether that portion of the crime committed within the State in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction. Commonwealth v. Macloon, 101 Mass. 1. This case contains an exhaustive review of both English and American authorities. A person committing larceny or theft in one State and carrying the stolen property into another is liable to prosecution for the offense of larceny in the latter State. People v. Staples, 91 Cal. 23; Commonwealth v. Parker, 165 Mass. 526; Myers v. People, 26 Ill. App. 173; Green v. State (Tex. 1896), 34 S. W. Rep. 283. *Contra:* Lee v. State, 64 Ga. 203; Sampson v. State, 23 Tenn. 456; Stroutber v. Commonwealth, 92 Va. 789. In cases of homicide, even in the absence of a statute authorizing it, the State in which the fatal blow was given may maintain a prosecution for the crime of murder, although the death occurs in another State. Hunter v. State, 40 N. J. Law, 495; Green v. State, 66 Ala. 40; Stout v. State, 76 Md. 317. In the case of Sampson v. State, 92 Ga. 41, it was held that the offense of shooting at an-

other takes effect and so is committed in Georgia when one on the South Carolina shore of the Savannah river aims and fires a pistol at another who at the time is in Georgia, though the ball misses him and strikes the water near his boat. Probably the most brilliant argument on this question and the most exhaustive review of the authorities is to be found in the interesting opinion of Shepherd, C. J., in State v. Hall, 114 N. Car. 909, in which it was held that a State court has no authority to prosecute a person for murder who, while standing within its boundaries, wrongfully shoots across the line and kills a person in another State, although the murderer and deceased are citizens of the former State. The court refers favorably as follows to an article appearing in this journal some years back: "In speaking of the validity of Acts similar to that of Edw. VI. Mr. Black, in an article in the Central Law Journal, Vol. 23, page 319, remarks: 'There is less difficulty in cases where the means of death employed, though set in motion in one jurisdiction, reach and operate upon their object in another territory, for of course the act can amount to nothing more than an attempt, until the fatal agency comes in contact with the body of the victim.'"

The leading case in regard to the locality of crime committed through the agency of the mails, is unquestionably that of People v. Rathbun, 21 Wend. 508. The opinion of Mr. Justice Cowan is exhaustive both upon reason and upon authority of the decided cases. It is a standard citation in all text books and is much to be relied upon in all jurisdictions where statutes have not established a different rule. It was held in this case that where a note with forged indorsements is sent by the felon through the mail from one county to an individual in another county, for the purpose of obtaining credit upon it, the crime is not consummated until the note is received by the person to whom it was sent, and the proper place of trial is the county to which the note was sent. In the case of United States v. Warrall, 2 U. S. 384, it was held that the offense of attempting to bribe an officer is completed at the time when at the place where the letter containing the corrupt offer is written and delivered at a postoffice in the district. And the federal court in such district has jurisdiction, though such letter is addressed to the officer residing in another State. A libelous charge made by A against B, contained in a letter written and mailed in Nebraska, to a person residing in another State, is sufficient to render A liable in Nebraska for the offense. Mills v. State, 18 Neb. 575. A, who lived in Pennsylvania, near the New York line, deliverd a sealed letter, the contents of which where libelous, to a messenger to be delivered to B in New York. Held, that A could be indicted therefor in Pennsylvania. Commonwealth v. Dorrance, 14 Phila. 671. Where a false report or false statement of the condition of a bank is made, subscribed and sworn to by an officer of a bank in one county and is then transmitted to and received by the bank commissioner in another county, in which his office is held, the jurisdiction of the offense is in either county. State v. Mason, 61 Kan. 102. Where the representations on which a prosecution was based were made in letters transmitted by mail, and there was no evidence as to where any of them had been mailed or received, the jurisdiction did not appear for want of proof of venue. People v. Griffith (Cal. 1898), 54 Pac. Rep. 725. Where a letter sent to one threatening to accuse him of a crime is mailed in B county, the offense of sending such letter is committed there and is not triable in C county, under a statute providing that offenses shall be prosecuted in the county where committed. Landa v. State, 26 Tex. App. 580.

A. H. ROBBINS.

JETSAM AND FLOTSAM.

PHYSICAL INJURIES RESULTING FROM FRIGHT.

The CENTRAL LAW JOURNAL for May 3, 1901, 52 Cent. L. J. 339, contains an able article by J. F. D. Meighen, Esq., on the topic, "May Damages be Recovered for Physical Injuries Resulting from Fright Caused by Defendant's Wrongful Acts." The article is in effect a reargument of the question passed upon in Mitchell v. Rochester Ry., 151 N. Y. 107, reaching a different conclusion from the one arrived at in that case. The courts of Massachusetts and of several other States have considered the same question within the past few years, concurring with the New York Court of Appeals in answering the question propounded by Mr. Meighen in the negative. Theoretically, his argument in favor of recognizing a cause of action is a strong one. Indeed, the strength of such theoretical argument has been conceded by most of the courts that took the opposite view. Mr. Meighen makes one point, however, which quite clearly is open to criticism. He says: "A long line of decisions hold that negligent acts of a railway company, such as unnecessary and excessive whistling or letting off steam, may be the proximate cause of injuries resulting through a runaway horse, and damages have been awarded for such injuries (citing case). Now, if the fright of a horse does not necessarily break the chain of causes between the act and the injury, why should the fright of a human being break that chain of causes?" With all due respect, we think the learned writer has overlooked logical distinctions of facts and circumstances in employing the illustration from animals. We submit that the rules of law with regard to frightened human beings are substantially the same as those with regard to frightened horses. "If one is placed, by the negligence of another, in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance. Even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault. The confusion of mind, caused by such negligence, is part of the injury inflicted by the negligent person, and he must bear its consequences." Shearman & Redfield on Negligence (5th Ed.), sec. 89.

The rule laid down in Mitchell v. Rochester Railway Co., *supra*, applies only to cases where the fright is directly, and without external intervening agency, the cause of injury to the person frightened. The recent decision of the Supreme Court of Iowa in Lee v. City of Burlington, 85 N. W. Rep. 618, applied precisely the same rule to the case of alleged injury under similar circumstances through frightening a horse. It was held that where the negligent operation of a street roller frightens a horse and causes it to rupture a blood vessel in its heart, which results in death, there can be no recovery therefor. The Iowa

court recognized the analogy to Mitchell v. Rochester Railway Co., *supra*, and similar cases, and cites them as arguments for the decision.

The weakest part of Mr. Meighen's contention is addressed to the thesis: "The rule allowing damages can be satisfactorily administered in practice." It is because almost all the courts in which the question has been raised have disagreed with the writer on this point that the recognition of a cause of action has been refused. He says in part:

"It is no more difficult to ascertain the degree of a physical injury resulting from mental shock than of an injury resulting from physical impact. Miscarriage resulting from fright, for example, can be compensated as satisfactorily as miscarriage resulting from a blow on the body. In Mitchell v. Rochester Ry. it is urged against this rule that such injuries are easily feigned. Physical injuries resulting from either impact or fright may sometimes be feigned, but the courts have never seen in this fact a sufficient cause to refuse all damages for injuries resulting from impact, and I see no good reason that it should be considered a cause to refuse all damages for injuries resulting from fright. There are very few, if any, injuries resulting either from impact or fright that can be feigned so as to deceive medical examination. Death from fright could not well be feigned, neither could miscarriage, defective heart action, nor changes in the temperature of the body. Whether the injury has been proven, and whether it is feigned, are questions of evidence for the jury. When applied to purely mental injuries this objection has weight, but when applied to physical injuries it falls, because the rule allowing the jury to judge of the existence of physical injuries is well established. Some courts have intimated that a flood of speculative litigation would follow the adoption of this rule. But in jurisdictions that have adopted it the threatened flood has never come. Neither the courts nor the legislatures have shown any desire to change the rule. Why should there be a flood of speculative damage suits? Why should miscarriage or death resulting through fright be the subject of speculation more than miscarriage or death through bodily impact? Admitting that the adoption of this rule may in any small degree tend to increase litigation, this affords no good reason for its non-adoption. Litigation is visibly increased by the rule that a party to a contract is liable in damages for the breach of it, but that fact is no good reason that the rule should not exist. The courts must protect rights, even though that protection involves litigation."

We dissent from the statement that "it is no more difficult to ascertain the degree of a physical injury resulting from mental shock than of an injury resulting from physical impact," and, indeed, from nearly all the assumptions of fact contained in the above extract. Where there is a physical injury to start with, there is at least some definite basis for diagnosis. There are certain uniform medical rules which may be resorted to as tests of alleged consequences. It is well known that even in cases of bodily impact successful malingering constantly occurs. If mere fright were generally recognized as actionable, the question of physical injury in the majority of cases would be a problem purely of the individual. There would be no uniform scientific basis of reasonableness, nothing to prevent a plaintiff from palming off all manner of constitutional weaknesses as having been produced or aggravated by the subjective shock.

While, therefore, we are of opinion that the courts in Mitchell v. Rochester Railway Co. (*supra*) and kindred cases have laid down a salutary general rule, we would approve of at least one special exception to it by statute. It will be noted that several of the reported cases have been brought by women for indemnity for a miscarriage suffered through fright. They constitute Mr. Meighen's favorite,—as indeed they are the most plausible,—illustration in his general contention. It is well known and generally conceded that mental shock uniformly tends to produce that definite form of injury, and, therefore, it would not constitute hardship or oppression to permit recovery in such cases.—*New York Law Journal.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE — Partial Disability.—In a policy of life insurance, wherein it is provided for indemnity when the injury resulting from an accident shall "wholly disable him from transacting any and every kind of business pertaining to his occupation," a partial disability only, in conducting the business pertaining to the occupation given, will not justify a recovery, under the provisions of the policy.—COAD v. TRAVELERS' INS. CO. OF HARTFORD, CONN., Neb., 85 N. W. Rep. 558.

2. APPEAL — Record — Direction of Verdict.—Where the record contains substantially all of the evidence in a case, the refusal of the trial judge to direct a verdict may be reviewed on appeal, though all the evidence is not set out.—BURTON v. VARIETY IRON WORKS, Mich., 85 N. W. Rep. 472.

3. ATTORNEY AND CLIENT — Champerty.—The employment of an attorney under an agreement that he shall receive a part of the recovery does not constitute champerty, unless it also contains a further element that the attorney's services shall not constitute a debt due from the client either before or after the recovery, but that the attorney must look solely to the recovery for his compensation.—HADLOCK v. BROOKS, Mass., 59 N. E. Rep. 1009.

4. BANKRUPTCY — Claims — Set-Off — Preference.—Where a debtor of a bankrupt paid a debt to a creditor on which he was jointly liable with the bankrupt, and the creditor to whom the payment was made had been given a preference, which he had not surrendered, so as to enable him to have proved the claim against the bankrupt's estate, under Bankr. Act, § 57g, the debtor paying the claim was not entitled to set off the payment against his debt to the bankrupt by virtue of his right of subrogation to the rights of the creditor, since he became subrogated to the creditor's disabilities as well as his rights.—MORGAN v. WORDELL, Mass., 59 N. E. Rep. 1037.

5. BANKRUPTCY — Courts in Indian Territory.—Bankr. Act 1898, § 24b, which provides that "the several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction," confers such power only as to such inferior courts as were at the time of the passage of the act within their appellate jurisdiction; and the circuit court of appeals of the eighth circuit has no revisory jurisdiction over the proceedings of the courts of bankruptcy in the Indian Territory, the court of appeals for the territory alone having appellate jurisdiction over such courts since its creation in 1895.—IN RE BLAIR, U. S. C. C. of App., Eighth Circuit, 106 Fed. Rep. 662.

6. BANKRUPTCY—Exemptions.—The burden of showing that an article alleged to be exempt is within the provisions of the statute rests on the bankrupt.—IN RE TURNBULL, U. S. D. C., D. (Mass.), 106 Fed. Rep. 667.

7. BANKRUPTCY—Jurisdiction of District Court—Suit in Equity.—A district court of the United States is without jurisdiction of a suit in equity instituted by a bankrupt, pending proceedings in bankruptcy against him, to enjoin the enforcement of a decree of a State court setting aside a conveyance of property by the bankrupt and ordering its sale, entered in a suit commenced long prior to the filing of the petition in bankruptcy. Such a suit is not within the general jurisdiction of the district court, and no special jurisdiction to entertain it is conferred by the bankruptcy act.—PICKENS v. DENT, U. S. C. C. of App., Fourth Circuit, 106 Fed. Rep. 653.

8. BONA FIDE PURCHASER.—When a purchaser of land for a valuable consideration has notice of facts and circumstances which would put a reasonably prudent man on inquiry of a prior unrecorded conveyance to a third party, he is not a purchaser in good faith, under Gen. St. 1894, § 4180.—MCALPINE v. RESCH, Minn., 85 N. W. Rep. 545.

9. CARRIERS—Passenger — Alighting From Moving Train—Negligence.—Where a complaint in an action by a passenger against a railroad for injuries alleged that defendant's brakeman advised, directed, and assisted plaintiff to alight from a moving train, whereby plaintiff sustained injuries, the complaint was not insufficient, on the ground that it did not show that the brakeman was acting within the scope of his employment; there being an allegation that it was a duty of the brakeman to look after the safe debarkation of passengers.—PITTSBURGH, C., C. & ST. L. RY. CO. v. GRAY, Ind., 59 N. E. Rep. 1000.

10. CARRIERS OF PASSENGERS—Negligence.—Section 542, ch. 9, Consol. St. Neb. 1891, which provides that every railroad company shall be liable for all damages inflicted upon the persons of passengers while being transported over its road, except in cases where the injuries arise from the criminal negligence of the persons injured, does not make a common carrier an insurer of the safety of passengers, but merely establishes a presumption that damages inflicted upon a passenger are entirely attributable to the negligence of the railroad company.—CLARK v. ZARNIKO, U. S. C. C. of App., Eighth Circuit, 106 Fed. Rep. 607.

11. CONDITIONAL SALE — Reservation of Title—Validity.—A reservation of title in a conditional sale of goods is valid as between the vendor and the vendee, and those succeeding to the rights of the latter, with knowledge of such reservation.—BRADDOCK BREWING CO. v. PFAULDER VACUUM FERMENTATION CO., U. S. C. C. of App., Third Circuit, 106 Fed. Rep. 604.

12. CONTRACTS — By What Law Governed.—It being provided in the by-laws of a building and loan association that all contracts made by or with it shall be deemed to have been made at its home office in Illinois, stipulation in a mortgage given it by a member, on land in Indiana, for attorney's fees in case of foreclosure, conforming in its terms to the laws of Illinois, though not to those of Indiana, is good; it not being against the public policy of Indiana to contract in a mortgage for an attorney's fee for its foreclosure.—BARRY v. SNOWDEN, U. S. C. C., D. (Ind.), 106 Fed. Rep. 571.

13. CONTRACT — Joinder of Causes of Action.—A cause of action to recover for breach of defendant's contract to pay for sawing their logs is one on contract, within Rev. St. 1898, § 2647, authorizing the joinder in a complaint of several causes of action arising out of contract, though the complaint allege facts entitling plaintiff to a lien on the lumber sawed, and still in defendant's ownership, for the money due for sawing, and prays for such lien.—REINDL v. HEATH, Wis., 85 N. W. Rep. 495.

14. CORPORATIONS—Powers of Officers—Authority to Convey Property.—The officers of an active corporation have no power to convey its entire manufacturing plant without authorization by the stockholders, since the officers' authority only extends to the doing of acts in the line of business contemplated to be done by the corporation.—CONSOLIDATED WATER POWER CO. v. NASH, Wis., 85 N. W. Rep. 485.

15. CRIMINAL LAW—Homicide—Self-Defense.—Under Pen. Code, pars. 285, 286, defining the law of self-defense, and providing that, to justify killing another, the appearance of danger must be sufficient to excite fears of great bodily harm in a reasonable person, a charge which in effect stated that defendant was justified in acting on appearances and belief, if the actual necessity existed of killing the deceased in order to prevent great bodily harm to himself, was erroneous, since it excluded the right to act on appearances unless the danger was real.—MORGAN v. TERRITORY, Ariz., 64 Pac. Rep. 421.

16. CRIMINAL LAW—Misconduct of Juror—Verdict.—Misconduct by one or more of the jury which might have been prejudicial to the accused, raises the presumption, especially in a capital sense, that the accused has been prejudiced thereby, and vitiates the verdict, unless the prosecution shows beyond a reasonable doubt that the prisoner has received no injury by reason thereof.—STATE v. MORGAN, Utah, 64 Pac. Rep. 356.

17. DEED—Covenants — Incumbrances.—A covenant in a deed against incumbrances is not a personal covenant, but runs with the land, and passes to a remote grantee, though there may have been a nominal breach of the covenant when the deed was delivered.—GRISZLER v. DE GRAAF, N. Y., 59 N. E. Rep. 993.

18. DEED—Delivery.—A deed by a husband to his wife, in the nature of a voluntary settlement, will be held to have been delivered on the evidence that it was recorded with her assent and knowledge, and

was thereafter found in her possession, and that he, after its execution, expressed his satisfaction with what he had done, and announced that it was his intention thereby to give the property to her.—SHIELDS v. BUSH, Ill., 59 N. E. Rep. 962.

19. DEED—Execution— Presumption — Delivery. — The presumption of law of the delivery of a deed of conveyance on the date of its execution is overcome by proof of a manual delivery and acceptance by the grantee at a subsequent date, where there is nothing warranting a conclusion that a delivery was intended by the grantor prior to the time of the manual delivery.—BLAIR STATE BANK v. BUNN, Neb., 85 N. W. Rep. 527.

20. EASEMENTS—Nature of Servitude — Alteration. — Where, at the time plaintiff's mining claim was patented, the land was subject to a right on the part of defendant to convey water in an open ditch across the lands, defendant was not entitled to place a pipe line in the ditch for the conveyance of the water, such change being a substantial alteration of the method of enjoyment.—OLIVER v. AGASSE, Cal., 64 Pac. Rep. 401.

21. EQUITABLE ESTOPPEL—Silence— Laches.— Parties who passively, willfully, and knowingly suffer another to purchase unoccupied land and expend money thereon under an honest, though erroneous, belief, based on the county records, that his vendor's title is perfect, and that the deed under which the vendor claims is genuine and not a forgery, are estopped from asserting their title, as against the purchaser, after concealing their claim and the forgery for more than 18 years for the purpose of shielding the vendor from the consequences of his crime.—WAMPOL v. KOUNTZ, S. Dak., 85 N. W. Rep. 595.

22. EVIDENCE — Parol Evidence. — The terms of a promissory note cannot be contradicted, altered, or varied by evidence of a prior or contemporaneous parol agreement between the payor and the payee.—GARNEAU v. COHN, Neb., 85 N. W. Rep. 531.

23. FEDERAL OFFICERS—Banking Laws—Violation—Intent.—As evidence that overdrafts on a bank by its president were made with intent to abstract or misapply its funds, it may be shown that at the time of the overdrafts it was hopelessly insolvent, that this was due to its assets being notes of wholly irresponsible persons, and that these notes had been used by the president in connivance with the cashier, who was a director, and another director, to give him a fictitious credit.—BREESE v. UNITED STATES, U. S. C. C. of App., Fourth Circuit, 106 Fed. Rep. 680.

24. FRAUD—Fraudulent Conveyance- Mortgage—Rescission.—Where a merchant procures an addition to his stock of goods through fraud, and subsequently mortgages his stock to secure a pre-existing indebtedness, the seller cannot hold such goods by attachment, in a suit for the price thereof, as against the mortgagee, without showing that the latter had actual or implied notice of the fraud at the time of the execution of the mortgage, though the seller might have rescinded the sale and recovered the specific goods sold, though the mortgagee had no notice of the fraud.—NICHOLLS v. MCSHANE, Colo., 64 Pac. Rep. 375.

25. FRAUDS, STATUTE OF—Contract for Sale of Goods.—The delivery of goods purchased under an oral contract to a carrier is not sufficient acceptance of such goods by the buyer to take the contract outside the statute of frauds, but some act is required on the part of the buyer to show an intention to receive and accept the goods.—WILLIAMS-HAYWARD SHOE CO. v. BROOKS, Wyo., 64 Pac. Rep. 342.

26. FRAUDULENT CONVEYANCES — Security — Sale.—Where a debtor gave the president of a bank a bill of sale of the debtor's stock of goods, and the president agreed to pay certain creditors, and a note to the bank was returned to the debtor, his overdraft balanced, and sums received from sale of the goods were distributed proportionately between the bank and the creditors agreed to be paid, the transaction was a sale, not the giving of security.—KNIPPENDORE DITTMAN CO. v. TRENOWETH, Colo., 64 Pac. Rep. 373.

27. FRAUDULENT CONVEYANCES — Subsequent Creditor.—Where a husband, in contemplation of contracting an indebtedness to plaintiffs and for the purpose of shielding his property, conveys such property to his wife voluntarily, or she knowing the object thereof, such conveyance may be set aside, and the property applied to the payment of plaintiffs' claim. —MORTON v. DENHAM, Oreg., 64 Pac. Rep. 384.

28. GAMING—Brokerage Contracts.—An action to recover money belonging to plaintiff which was paid defendants, without her knowledge or consent, on brokerage contracts by her husband, with whom she had intrusted the money to invest according to her direction, is an action for money had and received; and the question whether or not the contracts on which the money was paid were wagering contracts is immaterial.—JOHN G. MORGAN BROKERAGE CO. v. SHEMWELL, Colo., 64 Pac. Rep. 379.

29. GARNISHMENT—Rights Acquired.—An attaching creditor acquires no greater rights by garnishment than had his debtor.—CAHN v. CARPLESS CO., Neb., 85 N. W. Rep. 533.

30. GUARDIAN AND WARD — Action to Compel Accounting.—Const. art. 7, § 12, gives the county court probate jurisdiction and such other powers and duties as may be prescribed by law. Hill's Ann. Laws, § 895, gives such court exclusive jurisdiction in the first instance of granting and revoking letters of guardianship and of directing and settling guardians' accounts. Section 2884 requires the guardian to give bond, and requires him to settle his accounts, at the expiration of his trust, with the court or the ward, or the legal representative of the latter. A ward, on attaining her majority, and after her marriage, executed a release to her guardian. Held, that the county court had no jurisdiction thereafter of a suit to compel the guardian to account, but that the ward must resort to equity to have the settlement set aside, since the county court is not a court of general equitable jurisdiction.—BUTTERICK v. RICHARDSON, Oreg., 64 Pac. Rep. 390.

31. HABEAS CORPUS—Review—Criminal Law. — The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for a writ of *habeas corpus*. If the court had jurisdiction of the defendant, and authority to try the charge against him, its action can be assailed only in a direct proceeding.—MCCARTY v. HOPKINS, Neb., 85 N. W. Rep. 540.

32. HUSBAND AND WIFE—Sureties — Redemption. — Where a husband and wife, owning undivided moieties of land, mortgage it,—the wife being surety for the husband,—and the mortgagee redeems the husband's moiety from an execution against it, he cannot claim absolute title to the property redeemed, and also enforce the debt against the wife, but the wife is entitled to have the excess of value of the husband's moiety over the cost of redemption applied on the debt.—FREUD v. RUHL, Mich., 85 N. W. Rep. 468.

33. HUSBAND AND WIFE—Title by Adverse Possession — Community Property. — Where a married woman and her husband acquired possession of real property by a gift to the wife from her sister, and occupied it together for more than 20 years, after which time she was decreed to be the owner by adverse possession in a suit to quiet title brought by the administratrix of the sister, the title so perfected by adverse possession was not, in effect, a purchase with community funds, so as to give the husband a half interest in the land, but operated as a purchase by the wife, so as to make the land her separate property.—SIDDALL v. HAIGHT, Cal., 64 Pac. Rep. 410.

34. JUDGMENTS — Collateral Attack — Identity of Names.—Where the record of a case in which the de-

fendant was sued as administrator disclosed that the names of plaintiff and defendant were identical, it will not be presumed, in a collateral action, that the parties were the same person, and the judgment held invalid therefor.—ALLEN v. EVANS, Ariz., 64 Pac. Rep. 414.

35. JUDGMENT—Limitation of Action — Statutes. — Under Code Civ. Proc. § 336, limiting the time within which an action on a judgment or decree must be brought to five years, no recovery could be had in an action on a judgment brought more than five but less than six years after judgment was entered; Code Civ. Proc. § 1049, providing that an action is pending from its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied, not giving additional life to the judgment.—FEENEY v. HINCKLEY, Cal., 64 Pac. Rep. 480.

36. JUDGMENT AGAINST SEVERAL DEFENDANTS—Appeal.—Where judgment was rendered against several defendants, and an appeal was allowed to them jointly, and the appeal bond was executed by one defendant without leave that the appeal might be severed, the appeal was properly dismissed, since the joint bond of all defendants was necessary to perfect the appeal.—ELLISON v. HAMMOND, Ill., 59 N. E. Rep. 966.

37. JUSTICES OF THE PEACE—Judgment on Default.—A judgment for a failure to appear, rendered in a justice court seven days after the return day, was defective, where the justice's docket stated that the defendant "failed to answer the complaint as required by law," under Hill's Ann. Laws, § 2055, subd. 4, requiring such entry to show that the party did not appear at the proper time and place.—GUARANTY SAV. & LOAN ASSN. v. OSBURN, Oreg., 64 Pac. Rep. 383.

38. LIFE INSURANCE—Suicide—Evidence.—Where the defense of suicide was interposed to an action on a life policy, and the uncontradicted evidence showed that the insured was suffering from a species of insanity usually attended with suicidal tendencies, the exclusion of testimony offered by the defense to show such facts was harmless.—WASEY v. TRAVELERS' INS. CO., Mich., 85 N. W. Rep. 459.

39. LIFE INSURANCE—Vested Interest of Beneficiary.—The beneficiary in a life policy has no vested interest in it during the life of the insured; it being issued by an association doing business under Laws N. Y. 1883, ch. 175, § 18, providing that membership in the association shall give a member the right at any time, with the consent of the association, to make a change in his beneficiary, without requiring the consent of the beneficiary. — LAMB v. MUTUAL RESERVE FUND LIFE ASSN., U. S. C. C., E. D. (Pa.), 106 Fed. Rep. 637.

40. LIMITATIONS—Demand—Evidence.—Where it appears from a contract that it was the intention of the parties thereto that the money or claim which is the subject-matter thereof, was to be paid upon a demand in fact, the statute of limitations does not begin to run until an actual demand for payment is made.—HORTON v. SEYMOUR, Minn., 85 N. W. Rep. 551.

41. LIMITATIONS OF ACTIONS—Adverse Possession.—Where the successive owners of a lot of land for more than 20 years in the aggregate have occupied a strip of land adjoining their lot, and at each conveyance of the lot the grantor has transferred his possession of the strip to his grantee, though the strip was not described in any of the deeds, the right of the owner of the record title to such strip is barred by the statute of limitations, since such possession and the right arising out of it may be transferred *in pais* by one to another.—WISHART v. MCKNIGHT, Mass., 59 N. E. Rep. 1028.

42. MASTER AND SERVANT—Assumption of Risk. — A minor employed as a servant assumes, to the same extent as an adult, the ordinary dangers and risks of his employment which he actually knows and appreciates, and those that are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them. —CUDAHY PACKING CO. v. MARCAN, U. S. C. C. of App. Eighth Circuit, 106 Fed. Rep. 645.

43 MASTER AND SERVANT—Injury to Third Person—Negligence of Servant.—Where the driver of a carriage is ordered by a superior to take the carriage to the barn, and he starts to do so, but before reaching the barn leaves his course, and goes in the opposite direction, for the sole purpose of getting a drink, his master is not liable for injuries caused by the running away of the team, which the servant negligently leaves unattended at the saloon, since the master is not liable for unauthorized acts of a servant, when not done in performance of his duty.—MCCARTY v. TIMMINS, Mass., 59 N. E. Rep. 1038.

44. MASTER AND SERVANT—Negligence.—Negligence cannot be presumed, nor the question thereof left to conjecture. It must be established by testimony, and may be inferred from it, but it is not necessary for plaintiff to establish negligence by direct and positive testimony, or by eyewitnesses to the transaction. If the testimony establishes facts or circumstances from which negligence may properly and reasonably be inferred, it is sufficient.—KWELL v. JOE BOWERN MIN. CO., Utah, 64 Pac. Rep. 367.

45. MINES AND MINERALS—Adjoining Claims—Injunction—Burden of Proof.—In an action by the owners of a mining claim to restrain the removal of ore by defendants, who owned an adjoining claim, and had entered by underground workings on plaintiff's claim, the burden was on defendants to show that the vein they were mining in plaintiff's claim had its apex in their claim.—MALONEY v. KING, Mont., 64 Pac. Rep. 351.

46. MORTGAGES—Foreclosure Sale—Defective Notice —Where the advertisement and notice for a foreclosure sale described the property, as in the mortgage, as four lots, whereas one of the lots, on which a house had been built, had been released from the mortgage, the sale was defective, not being remedied by the auctioneer announcing before the sale that only the three lots would be sold; and a junior mortgagee was entitled to bring a bill to redeem the property from the mortgage against the purchaser at the sale made to his agent, who was the assignee of the mortgage.—PEOPLE'S SAV. BANK OF WOONSOCKET v. WUNDERLICH, Mass., 59 N. E. Rep. 1040.

47. MORTGAGE—Release—Acts of Directors.—A mortgage to a bank is released, without being delivered up, where the directors of the bank pass a resolution releasing it, holding the personal security only, to enable the mortgagor to improve the property, and he does so and conveys the property, and no claim is made on the mortgage till ten years later, and then by the bank's assignee.—IN RE BANK OF WEST SUPERIOR, Wis., 85 N. W. Rep. 501.

48. MUNICIPAL BONDS—Repeal of Statutory Provisions for Payment.—Where the legislature of a State has authorized a municipality to issue bonds, and provided in the same act for the levy and collection of taxes to pay the principal and interest of the same, such provision becomes a part of the contract on the issuance of the bonds, which cannot be impaired by any subsequent legislation; and a federal court which has rendered a judgment against the municipality on such bonds or their coupons may compel the levy of a tax for its payment by *mandamus*, notwithstanding the attempted repeal of the provisions therefor by the legislature.—PADGETT v. POST, U. S. C. C. of App., Fourth Circuit, 106 Fed. Rep. 600.

49. MUNICIPAL CORPORATIONS — Actions — Filing of Claims—Conditions.—Laws 1885, ch. 441, subch. 5, § 24, providing that no action shall be maintained against a city, on any claim or demand of any kind whatsoever, until such claim shall have been presented to the council, is not a condition precedent to the right of action, but is in the nature of a statute of limitations

and hence plaintiff need not allege compliance with it, but defendant must allege failure to comply, or the point will be waived.—DAVIS v. CITY OF APPLETON, Wis., 85 N. W. Rep. 515.

50. MUNICIPAL CORPORATIONS—Dangerous Sidewalk —Notice.—Where a deep area way along the line of the sidewalk on a busy street in a large city is insufficiently guarded, and has existed in such condition for a long period of time, the city is chargeable with knowledge of the danger. — DONNELLY v. CITY OF ROCHESTER, N. Y., 59 N. E. Rep. 989.

51. PARTITION—Parties. — Where, in an action for partition by the administrator of a deceased mortgagor of an undivided one-half of a law library, against the purchaser of the other undivided one half, alleged to be in exclusive possession, it appeared that defendant had possession of only one undivided one-half, the undivided one-half claimed by plaintiff being in the possession of, and title thereto claimed by, the widow of the deceased mortgagor, who was not a party to the action, as required by Rev. Stat., par. 2394, it was proper to refuse judgment for plaintiff.—GOLDMAN v. MILLAY, Ariz., 64 Pac. Rep. 433.

52. PARTNERSHIP—Intent—Sharing Profits.—Whether a written contract creates a partnership is to be determined by ascertaining the intention of the parties from their language. Where no question of estoppel is involved, persons cannot be held to be partners despite their intention not to form that relation. The right of participation in the profits of a business indicates the existence of a partnership, but actual intention is the decisive test.—GARRETT v. REPUBLICAN PUB. CO., Neb., 85 N. W. Rep. 596.

53. PARTNERSHIP—Investment by Partner—Consent of Firm.— Where money deposited in bank to the credit of a partnership was drawn out by one of the partners and loaned to parties who failed, and stock in a corporation was taken in the name of the partnership in payment of the debt, with the knowledge and consent of the other partners, the transaction was a partnership affair, so that the money withdrawn from the bank should be charged to the partnership, and on dissolution each partner was entitled to his share of the stock received.—COMSTOCK v. MCDONALD, Mich., 85 N. W. Rep. 581.

54. PLEADING—Counterclaim.—When the right to a counterclaim depends wholly upon statute, the defendant must not only plead a good cause of action in his favor against the plaintiff; but he must allege facts which bring his claim within the provisions of the statute.—GURSKE v. KEMPIN, Neb., 85 N. W. Rep. 557.

55. PRINCIPAL AND AGENT—Personal Liability—Ratification.—When an unauthorized agent makes a promise on behalf of his principal which is afterwards ratified, and on his own behalf also, both may be held. By ratifying an unauthorized act the principal adopts it as his own, and this adoption goes back to the inception, and continues to its legitimate end; for a principal cannot be allowed to avail himself of the benefits of a contract, and still repudiate its obligation.—GENTER v. CONGLOMERATE MIN. CO., Utah, 64 Pac. Rep. 362.

56. PROHIBITION—Power of Territorial Courts.—Rev. Stat. U. S. § 1963, provides that original and appellate jurisdiction of territorial courts shall be limited "by law." Section 1866 provides that the supreme courts of every territory shall possess chancery as well as common-law jurisdiction. Rev. Stat. par. 591, invests the supreme court, in addition to the powers conferred on it by the laws of the United States, with full powers to discharge all duties required of it by the laws of the territory. Paragraph 594 gives the court power to issue all writs necessary to a complete exercise of the powers conferred by law. Held, that the court had power to issue writs of prohibition.—CROWNED KING MIN. CO. v. DISTRICT COURT FOURTH JUDICIAL DISTRICT, Ariz., 64 Pac. Rep. 439.

57. RAILROAD COMPANY — Fee to Land Covered by Right of Way.—A railroad receiving a warranty deed to a strip of land for its track acquires a title in fee, subject, at most, to forfeiture for nonuser or misuser, and not a mere easement.—HICKS v. SMITH, Wis., 85 N. W. Rep. 512.

58. RAILROAD COMPANY—Negligence.—It is the duty of one who is about to step upon a railroad track to look in each direction to ascertain whether a train is coming, and, if his failure so to do results in his injury, he cannot recover therefor.—CHICAGO, B. & Q. R. CO. v. YOST, Neb., 85 N. W. Rep. 560.

59. RECEIVERS — Appointment — Pendente Lite. — Where the court appointed a receiver *pendente lite* in a suit to foreclose a mortgage, such appointment should not be set aside unless there appeared a plain abuse of judicial discretion, since the matter of such appointment rests largely in the sound discretion of the court.—O'DONNELL v. FIRST NAT. BANK OF ROCK SPRINGS, Wyo., 64 Pac. Rep. 337.

60. RECEIVERS—Effect of Assignment.—The lien of a creditor attaching property of a Connecticut corporation in Kentucky after appointment of a receiver for it by a Connecticut court, — the receiver not being vested with the property or powers of the corporation,—is not displaced by the subsequent general assignment to the receiver by the corporation.—ZACHER v. FIDELITY TRUST & SAFETY-VAULT CO., U. S. C. C. of App., Sixth Circuit, 106 Fed. Rep. 598.

61. RECEIVER—Grounds for Appointment.—A court will not appoint a receiver for a corporation on a preliminary application by a bondholder, where all charges of fraud and mismanagement, and all allegations which would authorize the appointment, are denied, but will postpone action until a hearing on the evidence.—BRADY v. BAY STATE GAS CO., U. S. C. C., D. (N. J.), 106 Fed. Rep. 584.

62. RECEIVERS—Grounds for Appointment. — In a suit to recover possession of property, the appointment of a receiver to take possession of such property pending the litigation is a matter resting in the judicial discretion of the court, and to be determined with a view to the protection of the rights of all the parties. Such appointment should not be made unless it appears that the property will otherwise be in danger, and that there is a reasonable probability that the complainant will ultimately prevail in the suit.—MOORE v. BANK OF BRITISH COLUMBIA, U. S. C. C., N. D. (Cal.), 106 Fed. Rep. 574.

63. REPLEVIN—Interest Entitling Plaintiff to Sue.—A person put in possession of property by mortgagees for the purpose of holding it and selling it under their orders, and who does sell it, and turn over the proceeds to his employers, though he looked to the property for his fees and expenses, and intended to wait until after the sale before asking for payment, has no such interest in the property as will entitle him to maintain replevin therefor, when it is taken from his possession, under Replevin Act, § 1, providing that, whenever any chattels shall have been wrongfully taken, replevin may be brought for their recovery by the owner "or person entitled to their possession."—PEASE v. DITTO, Ill., 59 N. E. Rep. 983.

64. REPLEVIN—Pleading—Allegations of Petition.—Where, in replevin, the complaint alleged that on a date named plaintiff was the owner and entitled to the possession of the property, and that he was in possession, and that defendant on that day, without plaintiff's consent, and against his will, unlawfully came into possession of the property, and that it was taken from his possession, the complaint was not objectionable on the ground that it failed to allege ownership or right of possession at the commencement of the action.—HARRIS v. SMITH, Cal., 64 Pac. Rep. 409.

65. SALES—Action for Price— Delivery. — Defendant instructed plaintiff to ship the goods ordered direct, freight prepaid, and await billing. Plaintiff delivered

the goods to a common carrier, marked with the defendant's name and place of business and took a temporary receipt for them in its own name, which recited that it was to be exchanged for the carrier's bill of lading. Defendant received two notices of the arrival of the goods, but never called for them. Held, that plaintiff's delivery of the goods was sufficient to entitle him to maintain an action for them as for goods sold and delivered.—DR. A. P. SAWYER MEDICINE CO. v. JOHNSON, Mass., 59 N. E. Rep. 1022.

66. SALES—Installment Payments — Retaking Property—Damages.—Plaintiff sued defendant in *assumpsit* for damages sustained by being compelled to take back a piano which he had sold defendant on installment payments. Defendant's demurrer to the complaint was overruled, with leave to plead on payment of costs. Defendant refused to plead, and a default was entered, and a jury sworn to assess plaintiff's damages. Held that, since defendant's default admitted the cause of action, plaintiff was entitled at least to nominal damages.—GRINNELL v. BEBB, Mich., 85 N. W. Rep. 467.

67. SALES—Unauthorized Contract by Agent—Ratification.—A vendor ratifies an unauthorized parol contract of sale made by his agent by suing the purchaser for the value of the property.—PLANO MFG. CO. v. MILLAGE, S. Dak., 85 N. W. Rep. 594.

68. SALE — Warranty — Horses. — In an action for breach of warranty in the sale of horses, it was not error to instruct that if the horses, when delivered to plaintiff, had at that time contracted the disease, although it did not develop until after the horses came to plaintiff's possession, it constituted an unsoundness under the warranty.—MCCANN v. ULLMAN, Wis., 85 N. W. Rep. 498.

69. SPECIFIC PERFORMANCE — Contract to Execute Lease.—Where plaintiff expends a large sum of money in equipping a mill, and commences to operate the same, in reliance on defendant's contract to execute a 25 year lease to certain water rights, a suit to compel the execution of the lease will not be denied on the ground that it cannot be specifically enforced if executed.—ST. JOSEPH HYDRAULIC CO. v. GLOBE TISSUE-PAPER CO., Ind., 59 N. E. Rep. 995.

70. STATUTE—Authentication—Impeachment—Legislative Journals.—The journals of the two houses of the legislature are not competent to impeach the validity of a statute enrolled and authenticated by the proper officers.—NARREGANG v. BROWN COUNTY, S. Dak. 85 N. W. Rep. 602.

71. SUPREME COURT — Original Jurisdiction — When Assumed.—In a case falling within the original jurisdiction of the court, the general rule is not to exercise it where the primary right to be vindicated is of a private nature, though the question involved is *publici juris*, and even though a State officer is a party. No departure from the general rule indicated will be made unless the circumstances are of such an extraordinary character that adequate relief cannot be obtained by first resorting to the jurisdiction of the circuit court. Mere delay, or even irreparable loss to a private person, will not necessarily be deemed sufficient.—IN RE COURT OF HONOR OF ILLINOIS, Wis., 85 N. W. Rep. 497.

72. TAXATION—Assessment.—A railroad bridge across a navigable river, owned, used, and operated by a railroad company as a part of its line of road, is assessable for taxation by the State board of equalization, and not by the local assessor.—CHICAGO, B. & Q. R. CO. v. RICHARDSON CO., Neb., 85 N. W. Rep. 532.

73. TAXATION — Exemption.—Under Chicago Theological Seminary Charter, § 5, providing "that the property of whatever kind or description, belonging or appertaining to said seminary, shall be forever free and exempt from taxation for all purposes whatsoever," only such property is exempt as is used in immediate connection with the seminary, and the exemption does not include other property not so used, though the income thereof be used solely for school purposes.—BOARD OF DIRECTORS OF CHICAGO THEOLOGICAL SEMINARY v. PEOPLE, Ill., 59 N. E. Rep. 977.

74. TAXATION—Exemptions.—In a suit by a property owner to recover taxes paid under protest, on the ground that the property is exempt from taxation, the burden is on him to show that the whole property is exempt.—ALL SAINTS PARISH v. INHABITANTS OF TOWN OF BROOKLINE, Mass., 59 N. E. Rep. 1003.

75. TRESPASS — Judgment.—Claims for mesne profits are usually consequential to and dependent upon a recovery of the land (in ejectment), yet where the disseisor has surrendered or abandoned the premises before suit, and the rightful owner is in possession, such owner may maintain trespass for the wrongful entry, and have damages for the same.—BLEW v. RITZ, Minn., 85 N. W. Rep. 548.

76. TRUST—Application of Income.—Under a testamentary trust fund, the income was to be applied to the support of the beneficiary, who was in the habit of occasionally indulging in alcoholic excesses, at which time a physician rendered services to him, with the knowledge of one of the trustees. The beneficiary had become insolvent, and it did not appear that the trustees had furnished him with all that was necessary with respect to medical attendance. Held, that a claim for such services rendered on the request of the beneficiary could be enforced in equity, as against the trustees.—SHERMAN v. SKUSE, N. Y., 59 N. E. Rep. 990.

77. VENDOR AND PURCHASER—Covenant—Burden of Proof.—In an action by a vendor of lands conveyed by warranty deed to recover the purchase price of the vendee, where a breach of the covenant of title is pleaded in defense, a *prima facie* case is made when the covenantee has shown by the records the title to be in a third person, and as far the record goes, no chain of title connecting the covenantor with such title.—ZERFING v. SEELIG, S. Dak., 85 N. W. Rep. 585.

78. WATERS AND WATER COURSES—Dams—Prescriptive Right.—Where a dam is maintained across a navigable stream for 40 years, whereby lands are overflowed by one claiming the right but having no authority so to do, such dam is a public nuisance, and, as against the public, there can be no prescriptive right acquired to maintain the dam, but as against the owner of the lands so overflowed, a right to maintain the dam is acquired by prescription, since the injury to their property is special, and they could move at any time to have the dam destroyed.—CHARNLEY v. SHAWANO WATER-POWER & RIVER IMPROVEMENT CO., Wis., 85 N. W. Rep. 507.

79. WATER COURSES—Diversion—Evidence.—A lower proprietor cannot maintain an action to abate and enjoin the maintenance of the improvements of an upper proprietor, upon the theory that such improvements injure and destroy a water power appurtenant to the land of such lower proprietor, when it appears that his asserted water power is in fact valueless, and not capable of beneficial development, and in consequence the improvements of the upper proprietor do not appreciably or sensibly injure his substantial right.—MINNESOTA LOAN & TRUST CO. v. ST. ANTHONY FALLS WATER-POWER CO., Minn., 85 N. W. Rep. 521.

80. WILLS—Charge on Real Estate.—Bequests of sums of money which testator must have known his personal property was not sufficient to satisfy, followed by a clause giving and devising "all the rest, residue, and remainder of my estate after my debts and funeral expenses are paid," are charged on the real estate.—WILLIAMS v. WILLIAMS, Ill., 59 N. E. Rep. 966.

81. WITNESS—Impeachment.—An instruction that a witness is impeached if he is shown to have made material statements out of court other than those sworn to, is erroneous, since such statements must be contradictory in order to authorize a finding that he has sworn falsely concerning a material matter.—ELROD v. ASHTON, S. Dak., 85 N. W. Rep. 599.